

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Stockton, CA)

LEATHERBACK INDUSTRIES

Employer

and

Case 32-RC-4702

**GENERAL TEAMSTERS UNION LOCAL
NO. 439, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO**

Petitioner¹

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Leatherback Industries, a Delaware corporation, herein the Employer, is engaged in the manufacture of roofing paper at a facility located at 248 Industrial Drive, Stockton, California. During the past twelve months, the Employer purchased and received goods or services valued in excess of \$50,000 directly from points located outside the State of California. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. Accordingly, the assertion of jurisdiction is appropriate herein.

¹ The name of the Petitioner was changed to reflect its affiliation with the AFL-CIO.

² Briefs filed by both parties have been duly considered.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. By its November 18, 1999 petition, Petitioner seeks to represent a bargaining unit including all full-time and part-time employees of the Employer, excluding office clerical employees, guards, and supervisors as defined by the Act. Contrary to the Petitioner, the Employer, while agreeing generally to the appropriateness of this proposed unit, contends that six individuals employed in the position of “foremen” are supervisors within the meaning of Section 2(11) of the Act, and therefore, should be excluded from the unit sought. Comprising this group of foremen are four production foreman, one shipping/receiving foreman, and one maintenance foreman. In total, the Petitioner’s proposed bargaining unit would amount to approximately 30 employees.

The Employer operates an around-the-clock plant, herein referred to as the Stockton plant, in which it manufactures roofing paper, which is eventually sold to wholesalers and distributors. GAF Corp., located in Wayne, New Jersey, has been the Employer’s parent company since 1995. As part of this manufacturing process, the Stockton plant is primarily responsible for the saturation component of the production of roofing paper. This saturation process involves dipping rolls of dry felt paper in vats of asphalt until an optimal saturation point is reached. Aside from the Stockton plant at issue here, the Employer also has offices in Albuquerque, New Mexico, and Hollister, California. In addition to being a saturation plant, and a paper mill, which manufactures raw product, the Hollister facility additionally serves as the Employer’s corporate and production base, where sales, payroll, and production issues are handled. About one month prior to the due date of products, the Hollister facility generates a production schedule for the Stockton plant. From this schedule, Bill Blaine, the plant superintendent, ascertains the quantity of product to be produced in a specific time frame. From the original four types of raw material, the Stockton plant produces eighteen different products. The Albuquerque plant is also a paper mill, and saturator. Both the Albuquerque and Hollister plants are unionized.

The manufacturing line in the Stockton plant approximates the size of a football field. Blaine, and Robert Lopez, the assistant superintendent, have separate offices, but none of the other employees, including the foremen, have separate offices. Lopez reports directly to Blaine. The foremen, in turn, report to Lopez. The plant is divided into three distinct departments: production, maintenance, and shipping/ receiving. Employees generally work three shifts: 6:00 a.m. to 2:00 p.m.; 2:00 p.m. to 10:00 p.m.; and 10:00 p.m. to 6:00 a.m. In the production department, other than the four production foremen, there are 8 stacker/ drivers, 4 winder operators, and 4 splicers. The stacker/drivers are responsible for unloading finished product from the production line and loading it in the warehouse. Winder operators operate a specific type of machine. Splicers operate opposite ends of the machine, whereby rolls are spliced onto other rolls to keep the

machine operating seamlessly. Included in the production department is a “PK (Plasterkraft) operator,” who operates a small machine the size of a desk. There are 3 maintenance employees and 2 shipping/receiving employees. Another employee in shipping and receiving is the forklift operator. Located outside the production line are a baler operator, who operates a machine called a baler, and reports directly to Lopez, and truck drivers who report directly to Blaine.

None of the employees wear a uniform, but all employees are required to wear long sleeves, steel-toed shoes, full-length pants, hardhats, and safety glasses. Except for Blaine and Lopez, all employees, including foremen, are paid an hourly rate, on a weekly basis. The foremen make a wage, on average, anywhere from \$1.25 - \$2.00, to \$2.30-\$5.30 higher than production, maintenance, and shipping and receiving departments employees.

With respect to benefits, all employees receive an annual Christmas bonus, and are eligible for performance bonuses, and attendance awards. Moreover, vacation accrual is based strictly on seniority, and not on job classification. All hourly employees, including foremen, are entitled to a health benefits plan after ninety days, which is different from the salary employees’ benefit plan.

The foreman position is the highest in each department. Since a higher rate of pay is achievable only by moving up the company ranks, and gaining experience in the different positions, foremen have a working knowledge of all aspects of the plant’s production, including splicing, winder operating, stacking and driving. Foremen make recommendations to Lopez and Blaine when employees seek a promotion to a higher classification, and a higher wage rate. In “most” cases the foreman’s recommendation as to whether a certain employee is competent for training for a higher position is followed. The record is clear, however, that the authority to decide to train and to promote does not rest with the foreman alone, but in conjunction with Lopez, and Blaine.

All foremen have the responsibility to approve overtime for themselves and other employees. While they are not required to seek the approval of higher authority for granting overtime because they are “in charge of the floor,” they are required to justify the overtime later to Blaine. Overtime has been authorized to replace absences, to clean up the production area, to help out in the shipping and receiving department, or when there is a major mechanical problem. In general, foremen have the ability to assign overtime in order to accomplish the job at hand.

In addition, foremen have the authority to send an employee home if he or she is impaired, insubordinate or otherwise not performing the job. If the employee refuses to leave the premises, the foreman can call the sheriff, and Lopez or Blaine.

It is undisputed that foreman have no authority to hire, suspend, or discharge. With respect to other forms of discipline, foremen report tardiness and other incidents warranting discipline. Specifically, they complete “tardy slips,” (Er Exh. 4(a)-(e)) and “reprimand reports” (Er Exh. 5(a)-(d)). In these reports, the foremen do not make a

recommendation with regard to discipline. Rather, after completing a reprimand report, the foreman and Lopez discuss informally the appropriate discipline to be meted out, and the foreman makes his recommendation. The ultimate decision to follow the foreman's recommendation, or to overrule the recommendation lies with Blaine. Foremen refer cases of major infractions, i.e. assault or stealing, and safety infractions, to Lopez or Blaine. The attendance policy is a no-fault, point system. Each infraction constitutes one point as part of the Employer's progressive disciplinary system, pursuant to the company handbook (Pet. Exh. 2, 3), whereby a certain number of points leads to certain discipline. Lopez signs all tardy slips and reprimand reports. Incidents necessitating the foremen's completion of reprimand reports include failing to follow direct orders, and speeding on a fork lift.

In addition, foremen evaluate employees, either verbally, by informing Blaine about the competence of an employee, or in writing, by written performance reviews. The written performance reviews are completed annually, but the record shows that they have no discernable impact on employees' terms and conditions of employment.

All foremen attend monthly meetings conducted by Lopez. These meetings are separate from company-held meetings for other employees. At these foremen meetings, the Employer examines issues related to safety, production, and operations. Sales and personnel issues are not discussed. Splicers or other employees fill in for the production foremen while the foremen attend these monthly meetings.

According to Blaine, the four production foremen have complete responsibility over the production line. Generally, they are responsible for the quality and speed of the production line. To this end, they regularly fill out quality control checklists, (Er Exh. 1(a)-(d)), saturator quality reports, (Er. Exh. 2), and production reports. In addition, they maintain inventories of raw materials. In the event of a shortage or a surplus of raw material, production foremen are responsible for calling vendors to ensure sufficient delivery of such materials, or to halt delivery of material. In the interest of quality, production foremen also make adjustments to the machinery, or to the production lines, level of asphalt, etc. Additionally, production foremen can decide to move employees into different jobs to accomplish the task at hand in a reasonable, safe manner.

The only production foreman who testified on the record was Alex Montejano, who has held this position for one and a half years. Contrary to Blaine's testimony, Montejano stated that he has never evaluated employees, or sent employees home.³ With respect to discipline, he has never suspended or fired employees, but has only filled out "write-up" forms, which are given to Lopez or Blaine to "take care of the rest." He also has never ordered raw product directly. Concerning overtime, it appears that Montejano uses no discretion in locating a replacement in cases of absences because employees take turns filling in. Also, he has never authorized training, and directs employees to speak with Lopez to receive permission to be paid overtime for training. After soliciting

³ Blaine testified that foremen send employees home when issues of nonperformance of work occur caused by, for example, insubordination or impairment.

Montejano's opinion as to a potential promotion, Lopez and Blaine decide whether the trainee will be promoted. The record shows one isolated instance when the Employer followed Montejano's recommendation for a promotion. There is no evidence that the Employer routinely follows his recommendations for promotions.

Approximately ten percent of the work of the maintenance foreman involves spinning wrenches, or working on the production line. For the remainder of the time, he organizes scheduled maintenance shut downs, as well as the preventative maintenance program, by correcting parts, and briefing employees about correct tool usage. The maintenance foreman is responsible for calling in maintenance personnel to respond to emergencies. He also deals with all vendors to purchase parts supplies, bearings, cleaning supplies, etc. To this end, he must attain Blaine's approval before opening credit applications, and creating a new account with a vendor. He has a \$5,000 limit daily to order such supplies without Blaine's approval. If there is excessive spending in the department, Blaine and the maintenance foreman sit down to discuss the budget.

According to shipping/receiving foreman Jessie M. Hernandez, he performs the same work as other employees in that department- he loads trucks, and pallets, and unloads flat beds. He does not direct employees in their work, and has never authorized overtime, written performance evaluations, or attended monthly foremen meetings. If a shipping/receiving employee is sick, the employee calls the front office, and not Hernandez. Hernandez does fill out tardy reports, and absence reports, but has never followed up on the reports by speaking with Lopez. Hernandez neither confirmed nor denied Blaine's testimony that he makes purchases of pallets, in the amount of \$1500/day. Finally, with regard to promotions, Hernandez has never denied any employee the opportunity for training for advancement purposes.

Based on the foregoing, I find, contrary to the Employer's contention, that the six foremen at issue are not supervisors within the meaning of Section 2(11) of the Act. As a preliminary matter, it is well-settled that the burden of establishing supervisory status is on the party asserting its existence. Chevron Shipping Co., 317 NLRB 379, 381 (1995). Extant Board law further dictates that Section 2(11) is to be read disjunctively in that evidence supporting any one of the listed criteria is sufficient to establish supervisory status. Ohio Power co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. Denied 338 U.S. 899 (1949); Allen Services, 314 NLRB 1060 (1994).

In this manner, the Employer has failed to demonstrate that foremen possess authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them, adjust their grievances, or effectively to recommend such action, as dictated by Section 2(11) of the Act. First, it is uncontroverted that foremen have no authority to hire, suspend, or discharge. The record furthermore lacks evidence that foremen have any role in transferring, laying off, or recalling employees. As for promotions, while foremen have the limited ability to train employees for a higher paying position as a precursor to a potential promotion, both Hernandez, and Montejano routinely authorize training for all employees, and have never denied any employee the right to undergo training. Moreover, according to Montejano,

employees must speak with Lopez before they are compensated with overtime pay for this training. Record evidence further shows that Blaine and Lopez make the final determination whether the trainee is entitled to the promotion. Further, Montejano's recommendation in one case regarding a promotion is insufficient to prove supervisory status since the evidence is inconclusive as to whether his recommendation was followed without independent investigation. Children's Farm Home, 324 NLRB 61 (1997). In its totality, the evidence fails to establish that foremen exercise independent discretion with regard to promotions.

Concerning evaluations, even assuming that written evaluations are performed regularly, as Blaine contends, but foremen Montejano and Hernandez dispute, it is uncontroverted that these evaluations contain no recommendations affecting employees' job status. Therefore, the mere fact that evaluations are completed does not prove that foremen are statutory supervisors. Mount Sinai Hospital, 325 NLRB 1136 (1998).

The record shows that foremen's ability to discipline employees is equally limited. They can send an employee home if he is impaired or unwilling or unable to work. The Board, however, has found that the ability to send employees home for such "egregious and obvious" violations was insufficient to establish supervisory status since it points to an absence of independent discretion. Chevron Shipping Co., supra. at 381. Foremen additionally are required to report tardiness, as well as other incidents requiring reprimand. However, the foremen do little more than merely report these cases to Lopez, and leave the ultimate disciplinary decision to him, and Blaine, who themselves are guided by the well-delineated progressive disciplinary system outlined in the "Rules of Conduct" (Pet. Exh. 3). Since the foremen make no recommendations for discipline in the "tardy slips" and "reprimand reports," they play no role in the Employer's decision to actually impose discipline. Thus, the foremen have no supervisory role in disciplining employees. Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997).

The Employer asserts that the foremen are statutory supervisors because they can grant overtime, make purchases for supplies on its behalf, and have some latitude in determining the flow and the direction of production. Each of these responsibilities falls short of demonstrating supervisory status. First, the foremen's authority to grant overtime is limited for the purpose of reaching production levels, to replace absences, to help out certain departments' work overflow, and for mechanical problems. In Montejano's case, in the production department, he exercises no independent judgement in deciding which employee to select for overtime, since employees rotate overtime work. Moreover, foremen are required to justify their decision to grant overtime to Blaine. Therefore, their limited role in apportioning overtime is insufficient to prove foremen are supervisors. Jordan Marsh Stores Corp., 317 NLRB 460, 467 (1995); Esso Corp., 298 NLRB 837, 839 (1990). The Employer further contends that foremen's purchases of supplies for their respective departments, and other actions, including completing daily reports, and making adjustments to machinery, and the production line to ensure quality and high production standards, confer supervisory status. The Board has concluded, however, that these actions standing alone are insufficient to prove supervisory authority since they are not within the enumerated 2(11) indicia, and they

prove only that foremen possess greater technical knowledge, and experience than other employees. Chevron Shipping Co., supra. at 382; Tri-City Motor Company, Inc., d/b/a Auto West Toyota, 284 NLRB 659, 661 (1987).

Finally, the Employer raises other secondary indicia to assert that foremen are supervisors. Specifically, it points out that foremen are paid a higher wage scale than other employees, and that they attend a special monthly meeting. These facts are inconclusive to establish statutory supervisory authority. From the minutes of such meetings, Er. Exh. 6, it appears that the topics discussed relate primarily to safety, and operations, and do not involve personnel issues, or other issues involving supervising departments. Similarly, higher wage rates for foremen do not conclusively prove supervisory status. Auto West Toyota, supra. at 661.; McClatchy Newspapers, Id. Thus, the Board will not make a finding of supervisory authority based solely on nonstatutory, secondary indicia of supervisory status. Beverly Enterprises, d/b/a Northcrest Nursing Home, 313 NLRB 491, 499-500 (1996). This evidence therefore fails to demonstrate that foremen are supervisors within the meaning of Section 2(11) of the Act.

In its brief, citing America's Best Quality Coating Corp., 313 NLRB 470, 477 (1993), the Employer contends, that foremen are supervisors because they are the "highest-ranking employees" during "substantial periods of time." In that case, however, not only was the employee at issue the only and highest-ranking employee during his shift, but the record clearly showed that he fired and disciplined employees. Obviously, the facts here are distinguishable since foremen satisfy none of the enumerated criteria as set forth in Section 2(11) of the Act. Furthermore, the Employer relies on Turnbull Cone Baking Company of Tennessee, 271 NLRB 1320, 1352 (1984), and Liquid Transporters, Inc., 250 NLRB 1421, 1425 (1980), to argue that the wage differential between employees and foremen necessitates a finding of supervisory status. Again, these cases are inapposite, and are inapplicable to the facts herein. In those cases, higher wages was only one of the factors used by the Board to conclude that these employees were supervisors. Record evidence justifying a finding of supervisory status in both cases was buttressed by evidence of the employees' exercise of independent judgment in effectively recommending employee's discharge, layoff, discipline, transfer, and assignment of work.

Accordingly, I find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time shipping and receiving, production and maintenance employees of the Employer, including "PK" operators, forklift driver/operators, and production, maintenance, and shipping/receiving foremen, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

Baler operators and truck drivers will vote subject to challenge.⁴

There are approximately 30 employees in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by **TEAMSTERS UNION LOCAL NO. 439, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care 359 Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, December 30, 1999. No extension of time to file

⁴ The Employer and the Union stipulated on the record that the positions of "PK Operator," and "forklift driver/ operator" are included in the proposed bargaining unit. Additionally, the parties further stipulated that those employees employed as "baler operator" and "truck drivers" would vote subject to challenge.

⁵ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by January 6, 2000.

Dated at Oakland, California this 23rd day of December, 1999.

/s/ Bruce I. Friend

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